RECORD AND BRIEFS

FILED
[PUBLIC] JAN 30 2017
OFFICE OF THE CLE
SUPREME COURT, U

No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 12, 2016
CERTIORARI GRANTED DECEMBER 14, 2016

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT DISTRICT OF DELAWARE (WILMINGTON) CIVIL DOCKET FOR CASE #: 1:14-CV-00028-LPS

Date Filed	#	Docket Text
01/14/2014	1	COMPLAINT filed with Jury Demand against Heartland Packaging Corporation, TC Heartland LLC - Magistrate Consent Notice to Pltf. (Filing fee $ 400, receipt number 311-1440599.) - filed by Kraft Foods Group Brands LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Civil Cover Sheet) (dmp,) (Entered: 01/14/2014)
01/14/2014	2	Notice, Consent and Referral forms re: U.S. Magistrate Judge jurisdiction. (dmp,) (Entered: 01/14/2014)
		* * *
05/07/2014	5	AFFIDAVIT of Service for Summons and Complaint served on TC Heartland, LLC d/b/a Heartland Food Products Group and Heartland Packaging Corporation on May 1, 2014, filed by Kraft Foods Group Brands

LLC. (Attachments: # 1 Exhibit A — Affidavit of Frederick L. Cottrell, III)(Cottrell, Frederick) (Entered: 05/07/2014)

* * *

06/23/2014	7	MOTION to Dismiss for Lack of Jurisdiction Over the Person, MOTION to Transfer Case to Southern District of Indiana - filed by Heartland Packaging Corporation, TC Heartland LLC. (Attachments: # 1 Proposed Order)(Graham, Mary) (Entered: 06/23/2014)
06/23/2014	8	OPENING BRIEF in Support re 7 MOTION to Dismiss for Lack of Jurisdiction Over the Person MOTION to Transfer Case to Southern District of Indiana filed by Heartland Packaging Corporation, TC Heartland LLC. Answering Brief/Response due date per Local Rules is 7/10/2014. (Graham, Mary) (Entered: 06/23/2014)
06/23/2014	9	DECLARATION re 8 Opening Brief in Support, 7 MOTION to Dismiss for Lack of Jurisdiction Over the Person MOTION to Transfer Case to Southern District of Indiana // *Teodor Gelov Declaration* by Heartland Packaging

Corporation, TC Heartland LLC. (Graham, Mary) (Entered: 06/23/2014)

* * *

09/05/2014 20 [SEALED] ANSWERING BRIEF in Opposition re 7 MOTION to Dismiss for Lack of Jurisdiction Over the Person MOTION to Transfer Case to Southern District of Indiana filed by Kraft Foods Group Brands LLC. Reply Brief due date per Local Rules is 9/15/2014. (Attachments: # 1 Exhibit A, # 2 Exhibit 1-7 to Exhibit A, # 3 Exhibit 8, Part 1 to Exhibit A, # 4 Exhibit 8, Part 2 to Exhibit A, # 5 Exhibit 9-11 to Exhibit A, # 6 Exhibit 12-13 to Exhibit A)(Cottrell, Frederick) (Entered: 09/05/2014)

* * *

10/14/2014 26 REPLY BRIEF re 7 MOTION to Dismiss for Lack of Jurisdiction Over the Person MOTION to Transfer Case to Southern District of Indiana filed by Heartland Packaging Corporation, TC Heartland LLC. (Graham, Mary) (Entered: 10/14/2014)

* * *

Appendix A

08/13/2015	59	REPORT AND RECOMMENDATIONS Recommending Denial of D.I. 7 MOTION to Dismiss for Lack of Jurisdiction Over the Person; MOTION to Transfer Case to Southern District of Indiana filed by Heartland Packaging Corporation, TC Heartland LLC. Please note that when filing Objections pursuant to Federal Rule of Civil Procedure 72(b)(2), briefing consists solely of the Objections (no longer than ten (10) pages) and the Response to the Objections (no longer than ten (10) pages). No further briefing shall be permitted with respect to objections without leave of the Court. Objections to R&R due by 8/31/2015. Signed by Judge Christopher J. Burke on 8/13/2015. (aer) (Entered: 08/13/2015)

* * *

09/24/2015	80	MEMORANDUM ORDER re 59 REPORT AND RECOMMENDATION is ADOPTED and 7 MOTION to Dismiss is DENIED. Signed by Judge Leonard P. Stark on 9/24/15. (ntl) (Entered: 09/24/2015)

* * *

10/23/2015	101	NOTICE OF DOCKETING in the Federal Circuit re petition for writ of mandamus — Case No. 16-105. (ntl) (Entered: 10/23/2015)

* * *

11/18/2015	114	MOTION to Stay *Pending Inter Partes Review and Motion for Modification of Scheduling Order Pending Decision on Motion for Stay* - filed by Kraft Foods Group Brands LLC. (Attachments: # 1 Exhibit 1 - Text of Proposed Order Staying Litigation, # 2 Exhibit 2 - Text of Proposed Order Extending Deadlines)(Cottrell, Frederick) (Entered: 11/18/2015)

* * *

12/07/2015	134	[SEALED] ANSWERING BRIEF in Opposition to *Kraft's Motion to Stay Pending Inter Partes Review* 114 filed by Heartland Packaging Corporation, TC Heartland LLC. Reply Brief due date per Local Rules is 12/17/2015. (Attachments: # 1 Exhibits 1-7)(Graham, Mary) Modified on 12/8/2015 (ntl). (Entered: 12/07/2015)

* * *

12/21/2015	149	ORAL ORDER: For reasons stated on the teleconference today, IT IS HEREBY ORDERED that 114 motion to stay is DENIED. ORDERED by Judge Leonard P. Stark on 12/21/15. (ntl) (Entered: 12/21/2015)

* * *

07/08/2016	333	ORDER dismissing claims. Signed by Judge Leonard P. Stark on 7/8/2016. (rpg) (Entered: 07/08/2016)

* * *

11/28/2016	426	ORDER re 425 MOTION for Dismissal of Certain Claims filed by Kraft Foods Group Brands LLC. Signed by Judge Leonard P. Stark on 11/28/16. (ntl) (Entered: 11/28/2016)

* * * *

Appendix A

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NO. 2016-105

Date Filed	#	Docket Text
		* * *
10/23/2015	2	PETITION of Petitioner TC Heartland LLC Petition for Writ of Mandamus pursuant to Fed. R. App. P. 21 [Consent: opposed]. Service: 10/23/2015 by email, US mail. [283180]
		* * *
11/09/2015	27	RESPONSE of Respondent Kraft Foods Group Brands LLC to the motion Petition for Writ of Mandamus [2] filed by Petitioner TC Heartland LLC in 16-105. Service: 11/09/2015 by email, clerk. [287491]
		* * *
11/16/2015	32	REPLY of Petitioner TC Heartland LLC to response filed by Respondent in 16-105, Doc. No [27]. Service: 11/16/2015 by email. [289246]

11/16/2015	33	AMICUS BRIEF FILED for Guy Fielder, Paul Morinville, Network-1 Technologies, Inc., Neurografix, Jon D. Paul, Scientific Telecommunications, LLC and US Inventor, Inc. [31]. Number of Pages: 14. Service: 11/16/2015 by email. Pursuant to ECF-10, filer is directed to file six copies of the brief in paper format. The paper copies of the brief should be received by the court on or before 11/23/2015. [289521]

* * *

12/08/2015	39	AMICUS BRIEF FILED for Electronic Frontier Foundation, Engine Advocacy and Public Knowledge [9]. Number of Pages: 10. Service: 10/29/2015 by US mail, email. Pursuant to ECF-10, filer is directed to file six copies of the brief in paper format. The paper copies of the brief should be received by the court on or before 12/14/2015. [294563]

* * *

12/08/2015	41	AMICUS BRIEF FILED for ASUS Computer International, Acushnet Company, *et al.* [22]. Number of Pages: 13. Service: 11/06/2015 by email. Paper copies of amicus brief were received 12/02/2015. [294589]

Appendix A

* * *

01/15/2016	46	ORDER filed scheduling oral argument. Oral argument will be held on Friday, March 11, 2016 at 2:00 p.m.. By: Merits Panel (Per Curiam). Service as of this date by Clerk of Court. [303150]

* * *

04/29/2016	57	PRECEDENTIAL ORDER filed denying [2] Petition for Writ of Mandamus filed by TC Heartland LLC. Service as of this date by Clerk of Court. [330607]
07/20/2016	58	Notice from the Supreme Court of the United States, application for extension of time within which to file petition for writ of certiorari granted - deadline 09/12/2016. [352327]
09/20/2016	59	Petition for writ of Certiorari filed on 09/12/2016 in the Supreme Court of the United States. Supreme Court #: 16-341, TC Heartland LLC v. Kraft Foods Group Brands LLC. [367687]
12/16/2016	60	The petition for writ of certiorari, [16-341], filed on 09/12/2016, was Granted on 12/14/2016. [391908]

APPENDIX B — COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, FILED JANUARY 14, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C. A. No.

KRAFT FOODS GROUP BRANDS LLC,

Plaintiff,

v.

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP,

-and-

HEARTLAND PACKAGING CORPORATION,

Defendants.

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Kraft Foods Group Brands LLC ("Kraft") for its Complaint against Defendants TC Heartland, LLC and Heartland Packaging Corporation (collectively referred to herein as "Heartland"), alleges as follows:

Appendix B

THE PARTIES

1. Kraft is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 3 Lakes Drive, Northfield, IL 60093. Kraft does business in this State through manufacturing facilities and products sold.

2. TC Heartland, LLC d/b/a Heartland Food Products Group is a corporation organized and existing under the laws of the State of Indiana and, upon information and belief, has a principal place of business at 14300 Clay Terrace Blvd., Suite 249, Carmel, Indiana 46032.

3. Heartland Packaging Corporation is a corporation organized and existing under the laws of the State of Indiana and, upon information and belief, has a principal place of business at 14300 Clay Terrace Blvd., Ste. 249, Carmel, Indiana, 46032.

JURISDICTION

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the patent laws of the United States, including 35 U.S.C. § 271, *et seq.*

5. The Court has personal jurisdiction over Heartland because Heartland has sold and offered for sale products that infringe Kraft's patents in this State and in this District, thereby causing injury to Kraft in this judicial district, and has otherwise generally subjected itself to

jurisdiction by general sales of products in this State and in this District.

VENUE

6. Venue is proper in this District pursuant to 28 U.S.C. §§1391(b),(c) and 1400(b).

THE PATENTS

7. On October 23, 2012, United States Letters Patent No. 8,293,299 ("the '299 Patent") entitled "Containers and Methods for Dispensing Multiple Doses of a Concentrated Liquid, and Shelf Stable Concentrated Liquids," was duly and legally issued to Kraft as the assignee of the named inventors. Since that date, Kraft has been the owner of the '299 Patent. A true and correct copy of the '299 Patent is attached to this Complaint as Exhibit A.

8. On August 20, 2013, United States Letters Patent No. 8,511,472 ("the '472 Patent") entitled "Containers Having Perforated Shrink Wrap Sleeves," was duly and legally issued to Kraft as the assignee of the named inventors. Since that date, Kraft has been the owner of the '472 Patent. A true and correct copy of the '472 Patent is attached to this Complaint as Exhibit B.

9. On December 10, 2013, the United States Letters Patent No. 8,603, 557 ("the '557 Patent") entitled "Containers and Methods for Dispensing Multiple Doses of a Concentrated Liquid and Shelf Stable Concentrated Liquids," was duly and legally issued to Kraft as the

assignee of the named inventors. Since that date, Kraft has been the owner of the '557 Patent. A true and correct copy of the '557 Patent is attached to this Complaint as Exhibit C.

COUNT 1 - INFRINGEMENT OF U.S. PATENT NO. 8,293,299

10. Kraft incorporates by reference the allegations set forth in paragraphs I through 9 as if fully rewritten herein.

11. On information and belief, Heartland is infringing the '299 Patent by manufacturing, using, offering to sell and selling products that infringe the '299 Patent including, but not limited to, products under the Refreshe label, including, *inter alia*, Refreshe Fruit Punch Drink Enhancer.

12. On information and belief, Heartland's foregoing acts of infringement have been and continue to be willful and deliberate.

13. Kraft has been damaged, in an amount to be determined, by Heartland's acts of infringement and will continue to be damaged by such acts in the future.

COUNT 2 - INFRINGEMENT OF U.S. PATENT NO. 8,511,472

14. Kraft incorporates by reference the allegations set forth in paragraphs 1 through 13 as if fully rewritten herein.

15. On information and belief, Heartland is infringing the '472 Patent by manufacturing, using, offering to sell and selling products that infringe the '472 Patent including, but not limited to, products under the Refreshe label, including, *inter alia*, Refreshe Fruit Punch Drink Enhancer.

16. On information and belief, Heartland's foregoing acts of infringement have been and continue to be willful and deliberate.

17. Kraft has been damaged, in an amount to be determined, by Heartland's acts of infringement and will continue to be damaged by such acts in the future.

COUNT 3 - INFRINGEMENT OF U.S. PATENT NO. 8,603,557

18. Kraft incorporates by reference the allegations set forth in paragraphs 1 through 17 as if fully rewritten herein.

19. On information and belief, Heartland is infringing the '557 Patent by manufacturing, using, offering to sell and selling products that infringe the '557 Patent including, but not limited to, products under the Refreshe label, including, *inter alia*, Refreshe Fruit Punch Drink Enhancer.

20. On information and belief, Heartland's foregoing acts of infringement have been and continue to be willful and deliberate.

21. Kraft has been damaged, in an amount to be determined, by Heartland's acts of infringement and will continue to be damaged by such acts in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Kraft prays for judgment and seeks relief against Defendants TC Heartland, LLC and Heartland Packaging Corporation as follows:

(a) For judgment that the '299 Patent, the '472 Patent and the '557 Patent have been infringed by TC Heartland, LLC and Heartland Packaging Corporation;

(b) For preliminary and permanent injunctions enjoining the aforesaid acts of infringement by TC Heartland, LLC and Heartland Packaging Corporation, their officers, agents, servants, employees, subsidiaries and attorneys, and those persons acting in concert with TC Heartland, LLC and Heartland Packaging Corporation, including related individuals and entities, customers, representatives, dealers and distributors;

(c) For an award of actual damages;

(d) For an award of pre-judgment and post-judgment interest, according to proof;

(e) For an award of enhanced damages pursuant to 35 U.S.C. § 284;

(f) For an award of attorney fees pursuant to 35 U.S.C. § 285 or as otherwise permitted by law;

(g) For all costs of suit; and

(h) For such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Kraft demands a trial by jury of all issues triable of right by jury.

/s/ Frederick L. Cottrell, III
Frederick L. Cottrell, III (#2555)
Anthony G. Flynn Jr. (#5750)
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Attorneys for Plaintiff
Kraft Foods Group Brands LLC

Dated: January 14,2014

APPENDIX C — AFFIDAVIT OF MAILING FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, FILED MAY 7, 2014 (EXHIBITS OMITTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 14-28-LPS

KRAFT FOODS GROUP BRANDS LLC,

Plaintiff,

v.

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP AND HEARTLAND PACKAGING CORPORATION

Defendants.

JURY TRIAL DEMANDED

AFFIDAVIT OF MAILING PURSUANT TO 10 *DEL. C.* § 3104 BY FREDERICK L. COTTRELL, III

I, Frederick L. Cottrell, III, first being duly sworn according to law do depose and say:

1. I am an attorney for Plaintiff Kraft Food Group Brands LLC ("Plaintiff").

2. Upon my knowledge and belief, Defendant TC Heartland, LLC d/b/a Heartland Foods Products Group is a corporation organized and existing under the laws of the State of Indiana and has a principal place of business at 14300 Clay Terrace Blvd., Suite 249, Carmel, Indiana, 46032.

3. Upon my knowledge and belief, Defendant Heartland Packaging Corporation is a corporation organized and existing under the laws of the State of Indiana and has a principal place of business at 14300 Clay Terrace Blvd., Suite 249, Carmel, Indiana, 46032.

4. On May 1, 2014, services of the Complaint and Summons for non-resident Defendants was delivered by certified mail, return receipt requested, to both Defendants at the address indicated above.

5. I received the return receipts from the United States Post Office. I have attached hereto as Exhibit 1 the receipt for certified mail and return receipts (i.e., the green cards) indicating Defendants' receipt of the Summons and Complaint in Indiana on May 1, 2014.

/s/_____
Frederick L. Cottrell, III (#2555)
cottrell@rlf.com

SWORN TO AND SUBSCRIBED before me, a Notary Public, this 7th day of May, 2014.

/s/_____
Notary Public

APPENDIX D — PROOF OF SERVICE FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, FILED MAY 7, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C. A. No. 14-28-LPS

KRAFT FOODS GROUP BRANDS LLC,

Plaintiff,

v.

TC HEARTLAND, LLC D/B/A HEARTLAND
FOOD PRODUCTS GROUP

-and-

HEARTLAND PACKAGING CORPORATION

Defendants.

JURY TRIAL DEMANDED

PROOF OF SERVICE OF COMPLAINT UPON DEFENDANTS TC HEARTLAND, LLC d/b/a HEARTLAND FOOD PRODUCTS GROUP AND HEARTLAND PACKAGING CORPORATION PURSUANT TO *DEL. C.* § 3104

Appendix D

Plaintiff Kraft Foods Group Brands LLC hereby provides proof of service of the Summons and Complaint upon Defendants TC Heartland, LLC d/b/a Heartland Food Products Group and Heartland Packaging Corporation pursuant to 10 *Del. C.* § 3104 by filing the return receipts of certified mail. Attached as Exhibit A is the affidavit of Frederick L. Cottrell, III, Esquire, stating that the non-resident Defendants were served with the notice required by and pursuant to 10 *Del. C.* § 3104, and the return receipts were received. The receipt for certified mail and return receipts are attached as Exhibit 1 to the Affidavit.

/s/ Frederick L. Cottrell, III
Frederick L. Cottrell, III (#2555)
Anthony G. Flynn Jr. (#5750)
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Attorneys for Plaintiff
Kraft Foods Group Brands LLC

Dated: May 7, 2014

APPENDIX E — DECLARATION OF TEODOR GELOV FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, DATED JUNE 23, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 1:14-cv-00028-LPS

KRAFT FOODS GROUP BRANDS LLC,

Plaintiff,

v.

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP

and

HEARTLAND PACKAGING CORPORATION

Defendants.

DECLARATION OF TEODOR GELOV

1. My name is Teodor Gelov. I am Chief Executive Officer of TC Heartland, LLC doing business as Heartland Food Products Group ("TC Heartland"). My business address is 14300 Clay Terrace Blvd., Suite 249, Carmel, Indiana 46032. I have held my current position with Heartland since the formation of the company in 2004. I have personal knowledge of the matters stated in this declaration.

2. TC Heartland manufactures and sells zero calorie sweeteners, liquid water enhancers, and certain other food products. A description of TC Heartland's business may be found at the company's website, www.heartlandfpg.com. The other company named above, Heartland Packaging Corporation, is an inactive Indiana corporation that ceased business operations some years ago and so far as I know is defunct. Heartland Packaging Corporation formerly made and sold portion control packaging; it never sold liquid water enhancers

3. TC Heartland's is a limited liability company organized and existing under the laws of the State of Indiana. TC Heartland's headquarters are located in Carmel, Indiana. TC Heartland develops, tests, and manufactures the subject liquid enhancer products in Carmel and at a facility located in Indianapolis, Indiana.

4. TC Heartland is not registered to do business in Delaware.

5. TC Heartland does not have any offices located in Delaware.

6. TC Heartland does not have any employees located in Delaware.

7. TC Heartland does not own or lease any real property in Delaware.

8. TC Heartland does not have any sales representatives in Delaware.

9. TC Heartland does not have any agents in Delaware.

10. TC Heartland does not engage in any advertising activities in Delaware.

11. TC Heartland does not engage in any marketing activities in Delaware.

12. TC Heartland does not have any distributors in Delaware.

13. TC Heartland has not entered into any supply contracts in Delaware.

14. TC Heartland does not have any bank accounts in Delaware.

15. TC Heartland does not have any mailing address in Delaware.

16. TC Heartland does not have any telephone number in Delaware.

17. TC Heartland does not call on any accounts in Delaware to solicit sales.

18. TC Heartland does not have any supply contracts governed by Delaware law.

19. TC Heartland has contracts with two national accounts which are headquartered outside of Delaware. From time to time, those accounts place orders with TC

Heartland in Indiana and specify that Heartland should ship purchased products to distribution facilities that the accounts maintain in Delaware. All such shipments are made by placing the purchased product with a common carrier that picks up the product at TC Heartland's manufacturing facility in Indianapolis. In one case, the buyer pays the freight; in the other, TC Heartland pays the freight.

20. In the year ending December 31, 2013, more than 99% of TC Heartland's total sales and more than 98% of TC Heartland's liquid water enhancer sales were shipped to destinations located outside of Delaware.

21. In the year ending December 31, 2013, 100% of TC Heartland's sales, including sales of liquid water enhancer products, were made under contracts entered into outside of Delaware, under non-Delaware law.

22. TC Heartland makes and bottles certain liquid water enhancer products for third parties, which the third parties then market and sell. One such product is the REFRESHE line of liquid water enhancers which TC Heartland makes and bottles for Safeway Inc. of Pleasanton, California. TC Heartland does not itself market or sell REFRESHE liquid water enhancer and has no license to do so. REFRESHE is a Safeway brand. TC Heartland makes and bottles REFRESHE liquid water enhancer according to specifications provided by Safeway, and sells and delivers the finished product exclusively to Safeway at destinations that do not include Delaware.

Appendix E

23. In marketing or selling liquid water enhancer products TC Heartland has never, to my knowledge, engaged in activities in Delaware with intent to invoke or benefit from the protection of Delaware law with respect to such activity.

24. The individuals who are knowledgeable of TC Heartland's formulation and development of its water enhancer products include former employees of TC Heartland who reside in the vicinity of Indianapolis.

25. The design and concept of the bottles in which TC Heartland packages the subject water enhancer products was developed by individuals who reside in the vicinity of Indianapolis.

26. Kraft Foods has long has a physical presence in Indiana. Kraft Foods currently operates a manufacturing facility in Kendallville, Indiana.

27. Coca Cola Company also manufactures liquid water enhancers in Indiana under, as of now, the Dasani, Minute Maid and PowerAde brands.

I, Teodor Gelov, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: Carmel, Indiana
June 23, 2014.

/s/_____
Teodor Gelov

APPENDIX F — HEARTLAND'S OPENING BRIEF FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, DATED JUNE 23, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 14-028 (LPS)

KRAFT FOODS GROUP BRANDS LLC,

Plaintiff,

v.

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP AND HEARTLAND PACKAGING CORPORATION,

Defendants.

HEARTLAND'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS CLAIMS FOR LACK OF PERSONAL JURISDICTION AND FOR TRANSFER OF VENUE TO THE SOUTHERN DISTRICT OF INDIANA

June 23, 2014

[TABLES INTENTIONALLY OMITTED]

Appendix F

NATURE AND STAGE OF THE PROCEEDINGS

This is an action for alleged patent infringement. In a complaint filed January 14, 2014, Plaintiff Kraft Foods Group Brands LLC ("Kraft") alleges that Defendants TC Heartland, LLC ("TC Heartland") and Heartland Packaging Corporation ("Heartland Packaging") have infringed and are infringing three Kraft patents by making, using, offering to sell, and selling certain liquid water enhancer products. (D.I. 1). On May 1, 2014, the United States Postal Service delivered to TC Heartland and Heartland Packaging in Carmel, Indiana, copies of Kraft's complaint in this action and summonses commanding TC Heartland and Heartland Packaging to appear in this Court or else suffer entry of judgment by default. (D.I. 5-1).

In view of recent Supreme Court decisions which limit specific jurisdiction to causes of action that arise from "an 'activity or an occurrence that takes place in the forum State,'" *Walden v. Fiore*, 134 S. Ct. 1115, 1121 n.6 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)), Defendants now move for an Order dismissing Kraft's complaint insofar as it seeks relief for alleged acts of patent infringement that have occurred or are occurring outside of Delaware, which is to say, more than 98% of the making, using, selling, or offering acts which the complaint characterizes as patent infringement. Defendants also move for an Order transferring the venue of this action to the Southern District of Indiana, which alone has personal jurisdiction to adjudicate the entire controversy between the parties. This is Heartland's opening brief in support of its motion.

Appendix F

SUMMARY OF THE ARGUMENT

Under Federal Rule of Civil Procedure 4(k)(1)(A), the mailing of summonses to Defendants in Indiana established personal jurisdiction over them only if, and to the extent that, the Defendants were "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Defendants are both Indiana corporate entities; they do not have any ties, connections, or relations with Delaware as could justify requiring Defendants to appear and defend the lawfulness of manufacturing and other activities that have no substantial connection with Delaware. Transfer of venue is warranted, for only in Indiana are Defendants subject to personal jurisdiction with respect to the entirety of the controversy that Kraft's complaint alleges. Transfer of venue to Indiana also accords with historical norms in patent infringement actions. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228–29 (1957) (holding that the special patent venue statute, 28 U.S.C. § 1400(b), takes precedence over the general venue statute, 28 U.S.C. § 1391).

STATEMENT OF FACTS

A. Kraft and Its Claims Against Heartland

Kraft is a Delaware corporation with its principal place of business in Northfield, Illinois. Kraft's complaint alleges that Defendants are infringing three United States patents owned by Kraft: (1) U.S. Patent No. 8,293,299 entitled "Containers and Methods for Dispensing

Multiple Doses of a Concentrated Liquid, and Shelf Stable Concentrated Liquids;" (2) U.S. Patent No. 8,511,472 entitled "Containers Having Perforated Shrink Wrap Sleeves;" and (3) U.S. Patent No. 8,603,557 entitled "Containers and Methods for Dispensing Multiple Doses of a Concentrated Liquid and Shelf Stable Concentrated Liquids."

Kraft alleges that Defendants infringe each of the three patents by "manufacturing, using, offering to sell and selling products that infringe . . . including, but not limited to, products under the Refreshe label, including, *inter alia*, Refreshe Fruit Punch Drink Enhancer." (D.I. 1 at ¶¶ 11, 15, 19). TC Heartland manufactures and bottles REFRESHE® fruit punch drink enhancer in Indiana for Safeway Inc. of Pleasanton, California. (Declaration of Teodor Gelov, sworn to June 23, 2014 ("Gelov Decl.") ¶ 22). Kraft seeks monetary and injunctive relief for Heartland's alleged infringements throughout the nation.

B. Defendants' Lack of Substantial Ties, Connections, or Relations With Delaware

TC Heartland is a limited liability company organized and existing under the laws of the State of Indiana, having its principal place of business in Carmel, Indiana, a suburb of Indianapolis (Gelov Decl. ¶ 3). TC Heartland develops, tests, and manufactures the subject products in Carmel and at a facility located in Indianapolis (*id.*). TC Heartland's business includes the manufacture and sale of zero calorie sweeteners, liquid water enhancers, and certain other food products, including the REFRESHE®

product that TC Heartland makes and bottles for Safeway (Gelov Decl. ¶ 2, 22).[1]

TC Heartland is not registered to do business in Delaware and has no office, property, employees, agents, distributors, bank accounts, or other local presence in Delaware (Gelov Decl. ¶ 4–9, 12, 14, 17). TC Heartland has no Delaware telephone number or mailing address (Gelov Decl. ¶ 15–16). TC Heartland does not engage in any advertising or marketing activities in Delaware and does not call on any accounts in Delaware to solicit sales (Gelov Decl. ¶ 10–11, 17). TC Heartland has not entered into any supply contracts in Delaware and does not have any supply contracts governed by Delaware law (Gelov Decl. ¶ 13, 18).

TC Heartland has contracts with two national accounts (both headquartered outside of Delaware) which, from time to time, place orders with TC Heartland in Indiana and specify that Heartland should ship purchased water enhancer products to distribution facilities that the accounts maintain in Delaware (Gelov Decl. ¶ 19). All such shipments are made by placing the purchased product with a common carrier that picks up the product at TC Heartland's manufacturing facility in Indianapolis (*id.*). In the year ending December 31, 2013, more than 98% of TC Heartland's sales of liquid water enhancer products were shipped to destinations located outside of Delaware (Gelov Decl. ¶ 20). In the year ending December 31, 2013,

1. Heartland Packaging is an inactive Indiana corporation that ceased business years ago and never sold liquid water enhancers of any kind (Gelov Decl. ¶ 2). It is not mentioned further.

100% of TC Heartland's sales of liquid water enhancer products were made under contracts entered into outside of Delaware, under non-Delaware law (Gelov Decl. ¶ 21).

In making liquid water enhancer products in Indiana, and in marketing and selling those products to persons outside of Delaware (and more than 98% of the time, also shipping the sold products to non-Delaware destinations), TC Heartland has not engaged in activities in Delaware with any intent to invoke or benefit from the protection of Delaware law with respect to those activities (Gelov Decl. ¶ 23).

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER KRAFT'S CLAIMS ARISING FROM NON-DELAWARE ACTIVITIES OR OCCURRENCES.

Kraft alleges that TC Heartland has infringed Kraft patents by "manufacturing, using, offering to sell and selling" certain "products" including REFRESHE® fruit punch drink enhancer that TC Heartland manufactures and bottles in Indianapolis, Indiana for Safeway Inc. of Pleasanton, California. (D.I. 1 ¶¶ 11, 15, 19). On its face, Kraft's complaint asserts claims that arise from activities or occurrences that have no connection with Delaware whatsoever; and this reality is rendered no less so by the happenstance that *some* of the claims asserted by Kraft might arise from activities or occurrences in Delaware and *might arguably* be ones that TC Heartland could lawfully be required to defend in Delaware.

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"Our case law clearly states that each act of patent infringement gives rise to a separate cause of action." *Hazelquist v. Guchie Moochie Tackle Co.*, 437 F.3d 1178, 1180 (Fed. Cir. 2006). *Accord E.I. du Pont de Nemours & Co. v. MacDermid Printing Solutions, L.L.C.*, 525 F.3d 1353, 1362 (Fed. Cir. 2008) ("we have held that each act of infringement gives rise to a separate cause of action."). *See also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) ("Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs.").

So here, the complaint characterizes as alleged patent infringement, and seeks relief with respect to, "manufacturing" activities occurring in Indiana and "selling" and "offering" and "using" activities occurring in California and other non-Delaware locations. Under Federal Rule of Civil Procedure 4(k), the Court lacks personal jurisdiction to adjudicate Kraft's claims arising from these non-Delaware activities. *Cf. Sears, Roebuck & Co. v. Sears plc*, 752 F. Supp. 1223, 1227 (D. Del. 1990) (Latchum, J.) (where Delaware activity did not "set in motion" an alleged infringement occurring outside of Delaware, personal jurisdiction was lacking to adjudicate infringement claims arising from non-Delaware activity even though personal jurisdiction did exist with respect to the defendant's alleged in-state infringements).

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital*

Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987). There is no federal statute that authorizes service of originating process in patent cases, so Federal Rule of Civil Procedure 4(k)(1)(C) does not apply. TC Heartland is subject to personal jurisdiction in Indiana, so Federal Rule of Civil Procedure 4(k)(2) does not apply. TC Heartland is not a party "joined under Rule 14 and 19," so Federal Rule of Civil Procedure 4(k)(1)(B) does not apply. That leaves, as the sole basis for personal jurisdiction in this case, Federal Rule of Civil Procedure 4(k)(1)(A), which states that service of a summons "establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." As set forth below, a quartet of recent Supreme Court decisions makes clear that a Delaware state court could not rightly exercise personal jurisdiction over the vast bulk of the activity that Kraft's complaint challenges as alleged patent infringement.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), the Supreme Court held that the State of North Carolina lacked personal jurisdiction to hear a claim against a non-resident tire manufacturer arising from a tire blow-out that occurred outside the state, where the defendant manufacturer's connections with North Carolina were not such as to make it "at home" in that state. *Id.* at 2857. This was so, the Court held, even though the defendant corporation allegedly made regular sales of tires in North Carolina. *Id.* at 2857 n.6. The Court stated: "even regularly occurring sales of a product in a State do not justify the exercise of personal jurisdiction over a claim unrelated to those sales." *Id.*

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In *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), the Supreme Court held that the State of New Jersey lacked personal jurisdiction to hear a claim against a nonresident manufacturer arising from the use of an allegedly defective machine made by the defendant, where the defendant manufacturer had not "engage[d] in any activities in New Jersey that reveal[ed] an intent to invoke or benefit from the protection of its laws." *Id.* at 2791 (plurality opinion). The defendant in *Nicastro* "had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State." *Id.* at 2790. Six Justices held that the facts were insufficient to support a conclusion that the defendant manufacturer had "purposefully avail[ed] itself of the privilege of conducting activities within the forum." *Id.* at 2787 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *id.* at 2792 (Breyer, J., concurring in the judgment). All of the Justices agreed that "specific" personal jurisdiction is limited to claims that arise from "the defendant's activities touching on the State." *Id.* at 2788; *id.* at 2797–98 (Ginsburg, J., dissenting).

In *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the Supreme Court held that a federal district court in California lacked personal jurisdiction to hear claims against a non-resident vehicle manufacturer arising from allegedly wrongful acts that occurred outside the state, where the defendant's connections with California were not such as to make it "at home" in that state. *Id.* at 751 (quoting *Goodyear*, 131 S. Ct. at 2851). This was so, the Court held, even if the defendant's U.S. subsidiary, Mercedes-Benz USA, LLC ("MBUSA"), were deemed to

be "at home in California" and even if the U.S. subsidiary's California contacts were deemed "imputable to" the defendant. *Id.* at 760. The defendant corporation was not itself "at home" in California and thus could not be sued there on claims "having nothing to do with anything that occurred or had its principal impact in California." *Id.* at 762.

Finally, in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Supreme Court held that a federal district court in Nevada lacked personal jurisdiction to hear a claim arising from an allegedly wrongful detention of the plaintiffs' property that occurred in Georgia, the effects of which detention were alleged to have adversely affected the plaintiffs in Nevada. "For a State to exercise jurisdiction consistent with due process," the *Walden* Court held, "the defendant's suit-related conduct must create a substantial connection with the forum state." *Id.* at 1121. "'Specific' or 'case-linked' jurisdiction 'depends on an 'affiliatio[n] between the forum and the underlying controversy' (*i.e.*, an 'activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation')." *Id.* at 1121 n.6 (quoting *Goodyear*, 131 S. Ct. at 2851). The alleged tort committed by the *Walden* defendant was held, as a matter of law, to have created no such "substantial connection" or "affiliation" between himself and Nevada.

With regard to the plaintiffs' contention that the *Walden* defendant's allegedly wrongful conduct had caused them injury in Nevada, the Court stated: "Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has

formed a contact with the forum State." *Id.* at 1125. "The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* The wrongful detention of the *Walden* plaintiffs' property did not establish a substantial or meaningful connection with Nevada, the Court reasoned, merely because the plaintiffs chose to be in Nevada when they desired to use the allegedly wrongfully seized property. *Id.* The plaintiffs would have experienced the same alleged injury in "California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had." *Id.* This point distinguished the *Walden* defendant's conduct from that of the defendants in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and *Calder v. Jones*, 465 U.S. 783 (1984), where libelous articles were published in the forum States and affected the plaintiffs' reputations in the minds of readers of the publications. In the case of libel, the Court reasoned, the tort actually occurs *in* the forum State by virtue of the injurious effects the publication had on the minds of readers in the forum state. *Walden*, 134 S. Ct. at 1124.

Measured against the legal standards articulated and applied in *Walden*, *Bauman*, *Nicastro*, and *Goodyear*, not to mention the Supreme Court's seminal decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), it is clear that the Court lacks personal jurisdiction to hear virtually all, if not all, of the claims that Kraft has asserted in this action. Under *Nicastro*, it is highly doubtful whether TC Heartland can rightly be deemed to have "purposefully avail[ed] itself of the privilege of conducting activities

within" Delaware (131 S. Ct. at 2787–88 (quoting *Hanson*, 357 U.S. at 253)), even with respect to the liquid water enhancer products that certain national, non-Delaware accounts have occasionally instructed TC Heartland to ship to Delaware destinations under the terms of master supply contracts solicited and entered into between TC Heartland and those accounts outside of Delaware, under non-Delaware law.

But even assuming, for purposes of argument, that the Court had personal jurisdiction to hear Kraft's claims arising from use or consumption of TC Heartland-manufactured products in Delaware, the Supreme Court's recent decisions in *Walden*, *Bauman*, and *Goodyear* make abundantly clear that the Court lacks personal jurisdiction to hear Kraft's claims arising from TC Heartland's manufacturing, using, offering, or selling liquid water enhancer products *outside* of Delaware. *Cf. Sears*, 752 F. Supp. at 1227–30 (alleged in-State infringement did not establish personal jurisdiction to hear claim arising from alleged infringement arising from activity outside of Delaware, even though same alleged intellectual property was being asserted).

Like the defendants in *Goodyear* and *Bauman*, TC Heartland has no physical or other presence in Delaware as could justify TC Heartland being deemed to be "at home" in Delaware, *Bauman*, 134 S. Ct. at 762, such that TC Heartland could be rightly sued here on claims arising from the allegedly wrongful manufacture of TC Heartland products in Indiana or the allegedly wrongful sale, offering for sale, or use of those products in, say, Alaska.

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Like the defendant in *Walden*, TC Heartland's alleged infringement of Kraft patents outside of Delaware (*e.g.*, by selling products made in Indiana to customers in California or Arkansas) does not establish any substantial connection between TC Heartland and Delaware. The Plaintiff's status as a Delaware corporation has no more jurisdictional significance here than did the plaintiff's Nevada residence in *Walden* or the Delaware residence of the shareholder's derivative suit plaintiff in *Shaffer*, 433 U.S. at 213–17 (defendant's status as a director of a Delaware corporation was insufficient to justify personal jurisdiction over an alleged breach of fiduciary duty committed by him in Arizona).

In *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1568 n.21 (Fed. Cir. 1994), the court suggested in dictum that a non-resident defendant could be required to defend claims arising from alleged acts of patent infringement occurring outside the forum state, without regard for whether the defendant was "at home" in the forum, *Bauman*, 134 S. Ct. at 762, and without regard for whether the acts were "subject to the [forum] State's regulation." *Walden*, 134 S. Ct. at 1121 n.6 (quoting *Goodyear*, 131 S. Ct. at 2851). As support for this assertion, the *Beverly Hills Fan* decision cited the same two libel cases, *Keeton* and *Calder*, that the *Walden* court distinguished en route to rejecting an effect-based theory of personal jurisdiction analogous to the one the *Beverly Hills Fan* decision suggested in dictum. The *Walden* decision effectively overrules this aspect of *Beverly Hills*

Fan,[2] and returns the law to the state it was in when Judge Latchum decided the *Sears* case, 752 F. Supp. at 1227–30.

II. THIS ACTION SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF INDIANA.

28 U.S.C. § 1400(b) provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

As used in 28 U.S.C. § 1400(b), the term "resides" has long been held to refer to a person's *domicile*, which in the case of a corporation "mean[s] the state of incorporation only." *Fourco*, 353 U.S. at 226 (citing *Shaw* v. *Quincy Mining Co.*, 145 U.S. 444 (1892)). *See Brunette Mach. Works, Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 707 n.2 (1972) ("the residence of a corporation for purposes of [§] 1400(b) is its place of incorporation"). In *Fourco*, the Supreme Court expressly held: "28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and . . . it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." 353 U.S. at 229.

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2. It is probably not a coincidence that, within a short time following the issuance of the *Beverly Hills Fan* decision, patent plaintiffs began flocking to the Eastern District of Texas.

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In *VE Holding Corp.* v. *Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), the Federal Circuit held that a 1988 amendment of § 1391(c)[3] had purportedly overruled the *Fourco* decision and, without comment, had abruptly rendered § 1400(b) a dead letter insofar as corporate defendants are concerned; however, in 2011, Congress repealed the text of § 1391(c) that the *VE Holding* court had interpreted. As amended by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, § 202, Pub. L. No. 112-63, 125 Stat. 758, 763 (2011), 28 U.S.C. § 1391(c) was completely rewritten and now provides, insofar as is relevant here, that: "For all venue purposes . . . an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction *with respect to the civil action in question* . . . ." 28 U.S.C. § 1391(c)(2) (emphasis added). The italicized language was newly added in 2011, and effectively restores § 1400(b) to its traditional role.

As noted above, TC Heartland clearly *is not* subject to the Court's personal jurisdiction "with respect to *the civil action* in question." 28 U.S.C. § 1391(c)(2) (emphasis added). "The civil action" here is defined by a complaint which, as to more than 98% of the allegedly infringing activity, asserts claims that arise from transactions and

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3. At the time of the *VE Holding* decision, then-existing 28 U.S.C. § 1391(c) (1988) had provided in part: "For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced."

events that have no connection to Delaware whatsoever. Current 28 U.S.C. § 1391(c)(2) prescribes a definition of "resides" that, wholly aside from the history of § 1400(b) and the Supreme Court's reasoning in *Fourco*, is not met here even assuming that amended § 1391(c)(2) were rightly interpreted as informing the meaning of "resides" in § 1400(b), which it is not.

28 U.S.C. § 1406(a) provides that, when a case is filed in the "wrong division or district," the district court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1404(a) further provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

Section 1404(a) is "intended to vest district courts with broad discretion to determine, on an individualized, case-by-case basis, whether convenience and fairness considerations weigh in favor of transfer." *Zazzali v. Swenson*, 852 F. Supp. 2d 438, 447 (D. Del. 2012) (quoting *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 883 (3d Cir. 1995)). The Court must analyze "all relevant factors," and is not bound by a "definitive formula or list." *Zazzali*, 852 F. Supp. 2d at 448.

Transfer to the Southern District of Indiana is warranted, as only there can the entire controversy between the parties be adjudicated. *Cf. Kerotest Mfg.*

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Co. v. C-O-Two Fire Equip. Co, 342 U.S. 180, 183 (1952) (second filed action in Illinois permitted to proceed, in part because Delaware court lacked personal jurisdiction over a part of the controversy). TC Heartland and its defunct affiliate, Heartland Packaging, are both domiciled in Indiana, meaning that the district court in Indianapolis has general personal jurisdiction over both Defendants and can adjudicate the entirety of the civil action commenced by Kraft's complaint. Transfer of this action to the Southern District also comports with historical norms and the clear intent of Congress reflected in the special patent venue statute, 28 U.S.C. § 1400(b), which has long been interpreted by the Supreme Court as limiting the venue of actions for patent infringement.

In addition to being the one place where the entire controversy between the parties may be adjudicated, the Southern District of Indiana is a logistically convenient forum for both parties. Not only is the Southern District of Indiana the location of TC Heartland's principal place of business and the principal place of the events giving rise to this suit and related evidence, it is significantly closer than Delaware to Kraft's own principal place of business in Northfield, Illinois, which is roughly a three-hour and fifteen-minute drive from Indianapolis. Kraft also maintains a manufacturing facility in Indiana (Gelov Decl. ¶ 26). Coca Cola Company also makes liquid water enhancers in Indiana, *id.* ¶ 27, and is likely to employ individuals who may be called as third-party witnesses knowledgeable as to the state of the liquid water enhancer art at relevant times.

Given the logistical advantages of litigating this matter in Indiana and the lack of connection between approximately 98% of the acts at issue and Delaware, it would be a waste of judicial resources for this Court to stretch to assert personal jurisdiction over Kraft's claims arising from the approximately 2% of TC Heartland's liquid water enhancer sales volume that non-Delaware parties have purchased and instructed be shipped to Delaware destinations, when transfer to the more convenient Indiana forum would avoid any questions of personal jurisdiction and permit certain adjudication of the entire controversy stated in Kraft's complaint. *Cf. A.L. Rowan & Son, Gen. Contractors, Inc. v. Dep't of Hous. & Urban Dev.*, 611 F.2d 997, 1001 (5th Cir. 1980) (mandating transfer from district court with jurisdiction over only one of two claims: "since only the Court of Claims can exercise jurisdiction over the entire case, we deem it in the interests of justice to transfer both of the claims . . . to the Court of Claims"); *Virgin Wireless Inc. v. Virgin Enters. Ltd.*, 201 F. Supp. 2d 294, 299 (D. Del. 2002) (dismissing case against one defendant for lack of personal jurisdiction and transferring remaining claims to forum of a related case in which that defendant had submitted to jurisdiction).

CONCLUSION

For the reasons stated above, Heartland submits that the Court should issue an Order (i) dismissing Kraft's complaint insofar as it seeks relief in this Court for acts of manufacturing, using, offering for sale, or selling of TC Heartland liquid water enhancer products that have

occurred or are occurring outside of Delaware; and (ii) transferring venue of this action to the Southern District of Indiana pursuant to 28 U.S.C. §§ 1404(a) and 1406(a).

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June 23, 2014

APPENDIX G — REPLY BRIEF IN SUPPORT OF HEARTLAND'S MOTION TO DISMISS CLAIMS FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, FILED OCTOBER 14, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 14-028 (LPS)(CJB)

KRAFT FOODS GROUP BRANDS LLC,

Plaintiff,

v.

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP AND HEART-LAND PACKAGING CORPORATION,

Defendants.

REPLY BRIEF IN SUPPORT OF HEARTLAND'S MOTION TO DISMISS CLAIMS FOR LACK OF PERSONAL JURISDICTION AND FOR TRANSFER OF VENUE TO THE SOUTHERN DISTRICT OF INDIANA

October 14, 2014

[TABLES INTENTIONALLY OMITTED]

Appendix G

INTRODUCTION

The special patent venue statute, 28 U.S.C. § 1400(b), has long been held to be "the sole and exclusive provision controlling venue in patent infringement actions." *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 (1961) (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957)). Section 1400(b) traces to the Act of March 3, 1897, ch. 395, 29 Stat. 695, 695–96 (the "1897 Act"). The 1897 Act was passed to abrogate the very venue rule that Kraft now advances, namely, one that permits patent infringement actions to be brought "in any district in which a defendant could be served." *Schnell*, 365 U.S. at 262. *See Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 712–13 (1972) (describing history and purpose of 1897 Act); *Stonite Prods. Co. v. Melvin Lloyd Co*, 315 U.S. 561, 563–66 (1942) (same). Faced with the very venue argument Kraft makes now, the Supreme Court in *Fourco* held that § 1400(b) "is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." 353 U.S. at 229. A contrary holding would have completely defeated the purpose of § 1400(b) and contravened basic canons of statutory construction. *Id.* at 228–29.

Under longstanding precedent, "the residence of a corporation for purposes of § 1400(b) is its place of incorporation." *Brunette*, 406 U.S. at 707 n.2. Section 1400(b) thus limits venue in patent infringement actions to districts (i) located in the state where a defendant is incorporated, or (ii) in which the defendant has "committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b). Here

it is undisputed that Heartland is not incorporated in Delaware and has no regular or established place of business in Delaware.

In its one-page discussion of § 1400(b), Kraft does not even argue that § 1400(b) permits venue of this action to be laid in Delaware. Rather, Kraft asserts (Kraft Br. at 13) that venue is proper in this district based on a combination of (i) non-existent language that formerly existed in a repealed, 1988 version of 28 U.S.C. § 1391; and (ii) *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), a 1990 decision which interpreted the non-existent language in former 28 U.S.C. § 1391 (1988) which Kraft erroneously cites.

In fact, and contrary to Kraft's suggestion, the text of *current* 28 U.S.C. § 1391 is expressly made subject to special venue statutes like § 1400(b). As amended in 2011, § 1391 now begins with a first section (a) headed "Applicability of Section," the text of which states, "*Except as otherwise provided by law*, -- (1) this section shall govern the venue of all civil actions brought in district courts of the United States . . . ." (emphasis added). The current text of § 1391 thus includes the very exception for special venue statutes whose omission from the 1988 version of the statute was the linchpin of the *VE Holding* decision. *See* 917 F.2d at 1579 ("Congress could readily have added 'except for section 1400(b),' if that exception, which we can presume was well known to the Congress, was intended to be maintained."). The Supreme Court has interpreted amended § 1391 in precisely this way. *See Atl. Marine Const. Co. v. U.S. Dist. Ct. for the West. Dist. of*

Tex., 134 S. Ct. 568, 577 n.2 (2013) ("Section 1391 governs 'venue generally,' that is, in cases where a more specific venue provision does not apply. Cf., *e.g.*, § 1400 (identifying proper venue for copyright and patent suits).")).

On its face and as interpreted in *Atlantic Marine*, current § 1391 plainly does not govern this case because a "more specific venue provision" clearly *does* apply here, namely, § 1400(b). Because venue is clearly improper under § 1400(b) and amended § 1391 is inapplicable, it is unnecessary for the court to reach the question of personal jurisdiction. Venue should be transferred to the Southern District of Indiana under 28 U.S.C. § 1406. (Part I, *infra*).

Should the Court nonetheless choose to reach the question of personal jurisdiction, the record is bereft of evidence that Heartland "purposefully directs activities at the forum's residents," *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1361 (Fed. Cir. 2012), even with respect to liquid water enhancer products that Heartland's non-Delaware based Customer occasionally instructs Heartland to ship to the Customer's distribution center in Delaware. As to the vast majority of the alleged infringements for which Kraft seeks relief (*i.e.*, acts of making, selling, offering to sell, or using liquid water enhancer products *outside* of Delaware), Kraft simply ignores the requirement that specific jurisdiction is limited to claims that arise from "an 'activity or an occurrence that takes place in the forum State'." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 n.6 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)). Kraft has identified not even a theory on which,

consistently with *Walden*, the court could rightly exercise personal jurisdiction to hear Kraft's claims arising from use of Heartland products in, say, California. (Part II, *infra*).

ARGUMENT

I. VENUE IS IMPROPER IN THIS DISTRICT

Citing what it calls "the plain language" of 28 U.S.C. § 1391, Kraft asserts that "[a]s a result of *VE Holding*, 28 U.S.C. §1391(c), not 28 U.S.C. §1400(b), controls the venue analysis in a patent infringement context." Kraft Br. at 13. Kraft is wrong. The so-called "plain language" cited by Kraft *was repealed* in 2011. The reasoning of *VE Holding*, even assuming that decision was correctly decided in 1990, actually supports Heartland's position on this motion, not Kraft's.

As previously noted (*see* Heartland Br. at 11), in *VE Holding*, the Federal Circuit held that a 1988 amendment of 28 U.S.C. § 1391 had purportedly overruled *Fourco* and predecessor cases and permitted patent infringement suits to be brought in any district where venue was proper under § 1391, even if § 1400(b) would otherwise bar venue. In reaching this result, *VE Holding* noted that the 1988 text of § 1391 did not contain any exception for special venue statutes like § 1400(b) and, to the contrary, included the broad language, "[f]or purposes of venue under this chapter . . . ." 917 F.2d at 1579, *quoted in* Kraft Br. at 13.

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In 2011, Congress amended § 1391 in three ways relevant to this motion. First, Congress repealed the language, "[f]or purposes of venue under this chapter," on which the *VE Holding* decision had relied. Second, and reinforcing its repeal of the "[f]or purposes of venue under this chapter" language, Congress added a new § 1391(a) headed "Applicability of Section" whose text begins, "*Except as otherwise provided by law* – (1) this section shall govern the venue of all civil actions brought in district courts of the United States . . . ." This second change added the very type of exception whose absence, in 1988, was a second ground on which *VE Holding* had relied. Third, and even as to civil actions governed by § 1391 (which the present action plainly is not, *see Atl. Marine*, 134 S. Ct. at 577 n.2), the definition of "residency" in § 1391 was amended to require that a defendant be subject to the court's personal jurisdiction "with respect to the civil action in question," not merely with respect to some part of the action as Kraft would have it.

As thus amended in 2011, 28 U.S.C. § 1391 excepts § 1400(b) from its reach and thus restores the latter statute as "a special and separate venue statute" which "place[s] patent infringement cases in a class by themselves, outside the scope of general venue legislation." *Brunette*, 406 U.S. at 713. *Atlantic Marine* leaves no doubt that § 1400(b) rather than § 1391 applies to patent cases: "Section 1391 governs 'venue generally,' that is, in cases where a more specific venue provision does not apply. Cf., *e.g.*, § 1400 (identifying proper venue for copyright and patent suits)." *Atl. Marine*, 134 S. Ct. at 577 n.2.

Especially in view of the new "except as otherwise provided by law" preamble, a general statute like 28 U.S.C. § 1391 is not rightly interpreted as nullifying and defeating the purpose of a more specific venue statute like § 1400(b). *Fourco* applied the canon of statutory construction that applies here: "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." 353 U.S. at 228-29 (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

The "residence of a corporation for purposes of § 1400(b) is its place of incorporation." *Brunette*, 406 U.S. at 707 n.2. Because Heartland is not incorporated in Delaware and does not have an established place of business in Delaware, § 1400(b) precludes the laying of venue in this district, as it did in *Fourco*, *Schnell*, and *Stonite*. Accordingly, the Court should transfer this action pursuant to 28 U.S.C. § 1406(a) to the Southern District of Indiana. Section 1406(a) provides that, when a case is filed in the "wrong division or district," the district court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Under § 1400(b), Indiana, where Heartland is incorporated and has its principal place of business, is a proper forum and the only forum which may hear the entire dispute.

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II. PERSONAL JURISDICTION OVER THIS ACTION IS LACKING

A. General Jurisdiction Is Lacking

Citing *LSI Indus. v. Hubbell Lighting, Inc.*, 232 F.3d 1369 (Fed. Cir. 2000), and other pre-2014 precedents, Kraft argues that Heartland is "subject to personal jurisdiction in this forum because its contacts with Delaware are 'continuous and systematic.'" (Kraft Br. at 11). But *LSI* and the other precedents cited by Kraft are outdated. Under the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), "the inquiry" for purposes of general jurisdiction "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* at 761. *Accord Intellectual Ventures I LLC v. Ricoh Co. Ltd.*, 13-474-SLR, 2014 WL 4748703 at *3 (D. Del. Sept. 12, 2014) (noting that, in *Daimler*, the Supreme Court "rejected as 'unacceptably grasping' an approach to finding jurisdiction wherein a corporation merely 'engages in a substantial, continuous, and systematic course of business [in the forum state]'").

Here it is undisputed that Heartland is an Indiana corporation and has no office, property, employees, agents, distributors, bank accounts, or other local presence in Delaware. By no stretch can Heartland be deemed "at home" in Delaware under *Daimler*. Kraft's assertion of general personal jurisdiction is meritless.

B. Specific Jurisdiction Is Lacking

With regard to the issue of whether the Court has specific jurisdiction to hear this action, Kraft's claims fall into two categories: (i) alleged infringements committed by Heartland or third parties *outside* of Delaware; and (ii) alleged infringements committed by Heartland or third parties inside Delaware. These categories of claims must be separately analyzed, for "each act of patent infringement gives rise to a separate cause of action," *Hazelquist v. Guchi Moochie Tackle Co.*, 437 F.3d 1178, 1180 (Fed. Cir. 2006), and specific personal jurisdiction is limited to claims that arise from an "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Walden*, 134 S. Ct. at 1121 n.6 (quoting *Goodyear*, 131 S. Ct. at 2851).

Insofar as Kraft seeks relief with respect to acts of making, using, selling, or offering to sell liquid water enhancer (LWE) products *outside* of Delaware, Kraft's opposition presents no basis on which the Court could rightly exercise specific personal jurisdiction. To the extent that Kraft asserts that Heartland infringed Kraft patents by *making* LWE products, it is undisputed that all such "making" activity occurred in Indiana. Heartland's *making* of LWE products in *Indiana* can by no stretch be characterized as an "act by which [Heartland] purposefully avail[ed] itself of the privilege of conducting activities within the forum State [*i.e.*, Delaware], thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

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Insofar as Kraft alleges that Heartland used, offered to sell, or sold LWE products *outside* of Delaware, or that Heartland allegedly induced or contributed to third party use or sale of LWE products *outside* of Delaware (e.g., in Arizona, California, Colorado, Idaho, Illinois, Kansas, Michigan, New York, Wisconsin), such activity also cannot by any stretch be characterized as acts by which Heartland "purposefully avail[ed] itself of the privilege of conducting activities within the forum State [i.e., Delaware], thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253. Sales or consumption of LWE products outside of Delaware is also beyond the Court's personal jurisdiction because it is not an "activity or an occurrence that takes place in the forum State and [that] is therefore subject to the State's regulation." *Walden*, 134 S. Ct. at 1121 n.6 (quoting *Goodyear*, 131 S. Ct. at 2851).

Even as to LWE products that Heartland's non-Delaware Customer purchased by submitting purchase orders to Heartland in Indiana and occasionally instructed be shipped from Heartland's Indiana manufacturing facility to a Customer facility in Delaware,[1] or that non-Delaware retailers may have purchased outside of Delaware and, on their own initiative, brought into Delaware, Heartland's acts are not fairly or rightly

1. While Kraft speaks of "at least 2%" (Kraft Br. at 1, 3) of Heartland's allegedly infringing sales as involving shipments to Delaware, Heartland CEO Teodor Gelov's testimony confirmed that the number is less than 2% (Gelov Decl. ¶ 20, Gelov Dep. at 50). Kraft adduced no evidence that Delaware sales are greater than as averred by Mr. Gelov.

characterized as acts by which Heartland "purposefully avail[ed] itself of the privilege of conducting activities within the forum State [i.e., Delaware], thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253. There is no evidence, or even any allegation, that Heartland's sales to Customer or any other customer were the result of Heartland soliciting or calling on Customer in Delaware or marketing LWE products to Customer in Delaware. There is no evidence that Heartland has advertised or marketed LWE products in Delaware. Rather, the uncontroverted evidence is that all Heartland shipments of LWE products to Delaware were initiated by Customer, under purchase orders submitted to Heartland in Indiana under a non-Delaware contract made between Heartland and Customer outside of Delaware under non-Delaware law.

Filling a non-Delaware customer's drop shipment orders in Indiana simply does not constitute "purposeful direction toward" Delaware, in the sense of case law applying specific jurisdiction principles. *AFTG-TG*, 689 F.3d at 1361 (shipments initiated by third-parties did not evidence "purposeful direction toward" the forum to which the accused products were shipped). It was Customer, not Heartland, which placed the LWE orders and initiated the shipments to itself from Heartland's facility in Indiana, under the terms of a master contract made and entered into outside of Delaware. Heartland's contacts with Delaware here fall far short of the activity that, in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), all of the Justices agreed did not "reveal an intent to invoke or benefit from the protection of [the

forum state's] laws." *Id.* at 2791 (plurality opinion); *id.* at 2793 (Breyer, J. concurring in the judgment and in this point).

But even assuming, for purposes of argument, that Heartland could be required to defend, in Delaware, alleged infringements committed inside Delaware by Customer or other third parties who may have sold or used the accused LWE products in Delaware, it would not follow that the Court could exercise personal jurisdiction with respect to independent acts of making, using, selling, or offering to sell accused LWE products *outside* of Delaware. *Cf. Sears, Roebuck & Co. v. Sears*, 752 F. Supp. 1223, 1230 (D. Del. 1990) (finding no jurisdiction over alleged non-Delaware trademark and trade name infringement, even though there was jurisdiction over related infringement in Delaware).

In asserting the contrary, Kraft relies on dictum in *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994), which reasoned that a State having jurisdiction to hear infringement claims arising within its borders "has a substantial interest in cooperating with other states to provide a forum for efficiently litigating plaintiff's cause of action." *Id.* at 1568. But under *Walden*, *Nicastro*, and *Goodyear*, the jurisdictional inquiry is not whether a State might have an "interest" in providing "a forum" for a plaintiff's purported claim, but whether a *defendant* has a *liberty* interest that would be invaded by forcing it to defend a claim that does not arise from an "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."

Walden, 134 S. Ct. at 1121 n.6 (quoting *Goodyear*, 131 S. Ct. at 2851).

Even before *Daimler* and *Walden*, then-Chief Judge Rader noted that, after *Nicastro*, "*Beverly Hills Fan*, with its unfettered reliance on a 'stream of commerce' theory, is now shaky precedent." *AFTG-TG*, 689 F.3d at 1368 (concurring opinion). The *Beverly Hills Fan* did not ask or answer the question whether all of the defendant's non-forum acts of alleged infringement were "subject to the [forum] State's regulation." *Walden*, 134 S. Ct. at 1121 n.6 (quoting *Goodyear*, 131 S. Ct. at 2851). Instead, *Beverly Hills Fan* merely cited to a libel-specific case, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (distinguished in *Walden*, as described in Heartland's Op. Br. at 8), and suggested policy reasons for allowing the adjudication of nationwide claims in the forum where some small amount of alleged infringement was deemed to have occurred. *Beverly Hills Fan*, 21 F.3d at 1568 ("other states will thus be spared the burden of providing a forum" and "defendants will be protected from harassment resulting from multiple suits"). Such policy reasons do not meet the jurisdictional standards elucidated by the Supreme Court in *Goodyear*, *Nicastro*, and *Walden*. In *Nicastro*, the New Jersey Supreme Court had given "significant policy reasons" for a finding of personal jurisdiction, but six Justices nevertheless voted to overturn that decision, with the plurality noting that "the Constitution commands restraint before discarding liberty in the name of expediency." *Nicastro*, 131 S. Ct. at 1791.

Kraft argues that "Heartland's proposed analysis would lead to manifestly absurd results" (Kraft Br. at 10), but 28 U.S.C. § 1400(b) protects against the "absurd result" postulated by Kraft. Kraft asserts that it would be "radical" and "turn the Civil Rules and statutory venue provisions . . . on their head" to require a patentee to "sue the infringer in its home district once" (*id.*), but that result is precisely what the special patent venue statute prescribes.

CONCLUSION

For all of the reasons set forth above and in Heartland's opening brief, Heartland requests that the Court grant Heartland's Motion and enter its Proposed Order.

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APPENDIX H — SECOND AMENDED ANSWER OF DEFENDANTS FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, DATED JANUARY 13, 2017

(OMITTED HEREIN, REPRODUCED IN SEALED APPENDIX)